

STATE OF MICHIGAN  
COURT OF APPEALS

---

KEITH RAINER,

Plaintiff-Appellant,

v

TRI COUNTIES MULTI TRADE CENTERS and  
FRANK BRANHAM,

Defendants-Appellees.

---

UNPUBLISHED

February 2, 2010

No. 289050

Wayne Circuit Court

LC No. 07-731875-NO

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals by right the circuit court's order granting defendants' motion for summary disposition. We affirm in part and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument. MCR 7.214(E).

Plaintiff, an employee of defendant Tri Counties Multi Trade Centers, tripped and fell on a sidewalk leading into the building. Because Tri Counties did not maintain workers' compensation insurance, plaintiff was permitted to bring a civil action against it pursuant to MCL 418.641(2). The circuit court granted defendants' motion for summary disposition on the ground that the defect in the sidewalk was open and obvious.

On appeal, plaintiff argues that the circuit court erred by failing to recognize that an uninsured employer nonetheless remains liable for statutory benefits under the relevant provisions of the Workers' Disability Compensation Act (WDCA), MCL 418.101 *et seq.* We agree.

Notwithstanding the WDCA's exclusive remedy provision, an employee who has suffered an injury in the course of his employment may bring a civil action against his employer if that employer has failed to maintain workers' compensation insurance in violation of §§ 171 and 611. MCL 418.641(2). In such a civil action, the employee is entitled to pursue both (1) damages for common-law tort liability, and (2) statutory benefits that would otherwise be recoverable under the WDCA. *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 312-313; 527 NW2d 5 (1995). Indeed, as this Court stated:

We hold that the WDCA does not absolve an employer who is uninsured from nonetheless remaining liable under its provisions for statutory benefits. Section 641(1) delineates criminal sanctions and § 641(2) imposes common-law liability *in addition to, but not as a substitute for*, benefits recoverable under the WDCA. [Emphasis added.]

This Court has also implicitly held that an injured employee's claims against his uninsured employer—whether for common-law tort damages or statutory benefits under the WDCA—must be pursued in a civil action rather than before a workers' compensation magistrate. *McCaul v Modern Tile & Carpet, Inc.*, 248 Mich App 610, 623; 640 NW2d 589 (2001). In other words, when an injured plaintiff brings a civil action against his uninsured employer, seeking both common-law tort damages *and* statutory benefits under the WDCA, both claims must be considered and adjudicated by the court.

Here, the circuit court granted summary disposition with respect to plaintiff's common-law negligence claim. However, the circuit court did not specifically separately consider whether plaintiff was entitled to statutory benefits under the WDCA.<sup>1</sup> Accordingly, we must remand to the circuit court for plenary consideration of plaintiff's claim for statutory benefits.<sup>2</sup>

Plaintiff also contends that the circuit court erred by granting summary disposition of his common-law negligence claim on the basis of the open and obvious danger doctrine. Under MCL 418.141, when an injured employee brings a civil action in accordance with § 641(2), the uninsured employer is barred from raising certain enumerated defenses. Plaintiff suggests that the open and obvious danger doctrine is substantially similar to one or more of these enumerated defenses, and that defendants were therefore not entitled to raise the open and obvious danger doctrine as a defense to his negligence claim.

---

<sup>1</sup> We acknowledge that plaintiff failed to properly preserve this issue concerning statutory benefits under the WDCA. However, we may overlook a preservation failure when a miscarriage of justice would result if we failed to address an argument, when the question is one of law and all the facts necessary for resolution of the issue have been presented, or when it is necessary to address the argument for a proper determination of the case. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Here, all three exceptions to the preservation requirement apply. Indeed, Tri Counties essentially concedes that an uninsured employer remains liable for statutory benefits. Also, the decision in *Smeester* clearly holds that an uninsured employer remains liable for statutory benefits; it is beyond genuine dispute. With respect to the sufficiency of plaintiff's complaint on the issue, the complaint does reference "wage loss," "medical expenses," "loss of benefits," and the "need for continued care and services." It also alleges "violations of common law and statute." These allegations arguably encompass a claim for statutory benefits under the WDCA. And even if a contrary conclusion can be reached, amendment of the complaint to specifically add a claim for statutory benefits would be proper. See MCR 2.118; MCR 7.216(A)(1) (providing that this Court may exercise all powers of amendment held by the circuit court).

<sup>2</sup> We note that there does appear to be an issue of fact concerning plaintiff's status as an employee at the time of the injury. But this matter can be addressed by the circuit court on remand.

Because plaintiff first raised this issue in a motion for reconsideration, it is not properly preserved for appellate review. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 106, 117; 724 NW2d 485 (2006). Moreover, plaintiff has failed to adequately address the merits of this claim in his brief on appeal. An appellant may not give cursory treatment to an issue with little or no citation to relevant supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). A failure to properly brief the merits of a claim of error constitutes abandonment of the issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

We affirm the circuit court's grant of summary disposition with respect to plaintiff's common-law negligence claim. But we remand for further proceedings consistent with this opinion on plaintiff's claim for statutory benefits under the WDCA.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kathleen Jansen